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MICHAEL RODAK, JR., C

No. 74-939

In the Supreme Court

of the United States

OCTOBER TERM, 1974

MAX A. QUICK,

Petitioner,

v.

WAYNE HANSEN,

Respondent.

REPLY BRIEF

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REPLY TO RESPONDENT'S ARGUMENT

Petitioner disagrees with respondent's analysis of *United States* v. *Appalachian Electric Power Co.*, 107 F.2d 769 (C.A. 4, 1939), reversed, *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

United States v. *Appalachian Power Co.* (the "New River" case) was a suit by the United States to enjoin a utility company which proposed to build a dam across the New River in defiance of a finding of the Federal Power Commission that the river was navigable, with its resulting requirement that the utility obtain a federal license before constructing the dam. The utility did not appeal the Commission's

finding of navigability, but instead disregarded it, compelling the United States to bring suit for the purpose of upholding the authority of the Commission. The District Court for the Western District of Virginia (23 F. Supp. 83) and the United States Court of Appeals for the Fourth Circuit both made *de novo* findings that the New River was not navigable, but were reversed by this Court, which held that the river was navigable.

This Court specifically reserved the issue of the effect to be given to the findings of the Federal Power Commission since ". . . the Government does not seek to have this Court pass on it in this case." (311 U.S. at 402, ftn. 7). The position of the United States was set forth in this Court's opinion as follows:

> "In both courts below the Government unsuccessfully urged that the findings of the Commission, if supported by substantial evidence, were conclusive. Although it still regards this contention as correct, the Government does not seek to have this Court pass on it in this case." (311 U.S. at 402).

The decision of the Court of Appeals had stated:

> "It is not disputed [i.e. by the United States] that the case can be judicially considered *de novo*, but it is said that the ordinary rule that findings of an administrative tribunal must be accepted, if supported by substantial evidence, must control a decision here on the facts."

Accordingly, far from approving by silence the decision of the Fourth Circuit on the weight to be

given findings of the Commission, this Court expressly reserved decision on that issue. It remains undecided.

In the case at bar, neither the State of Washington, the United States, the utility company which built Swift Dam, or property owners along the Lewis River challenged the finding of the Federal Power Commission that the Lewis River is a navigable waterway of the United States. The Respondent, an Oregon resident who injured the Petitioner while operating a pleasure craft on Swift Creek Reservoir, does not have an interest of sufficient importance to justify the Federal Courts in undertaking *any* review, either *de novo* or limited by a "substantial evidence" or other test, of the determination of the Federal Power Commission that the Lewis River is navigable. That issue was settled long ago among the parties and governments vitally interested and should be deemed settled as to those who subsequently engage in activities upon the waterway.

The decision of the United States Court of Appeals for the Ninth Circuit permits continuous relitigation of the issue of navigability of streams upon which huge hydroelectric dams have been constructed under major licenses issued by the Federal Power Commission.

CONCLUSION

For the reasons set forth in the Petition and in this Reply Brief, the writ of certiorari should be granted.

Respectfully submitted,

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